

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2006-0023

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY NORMAN L. BROWN
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
THE CITY OF LITTLETON AND MAYOR JIM TAYLOR.**

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon the complaint of Mr. Norman Brown that the Littleton City Council and Mayor violated § 1-45-117, C.R.S. of the Fair Campaign Practices Act by spending public money to urge Littleton board and commission members to vote against Amendment 38, a state-wide ballot issue.

Procedural History

The Secretary of State received Mr. Brown's complaint September 12, 2006. Pursuant to Colo. Const. art. XXVIII, § 9, the Secretary of State forwarded the complaint to the Office of Administrative Hearings (OAC) September 14, 2006. Hearing upon the complaint was held at the OAC September 29, 2006. Mr. Brown appeared on his own behalf. The Littleton City Council and Mayor were represented by City Attorney Larry Berkowitz and Assistant City Attorney Brad Bailey.

Issue

In August 2006, the Littleton City Council mailed literature opposing Amendment 38 to all Littleton board and commission members. Amendment 38 is a state-wide ballot issue to be decided by the electorate in the November 2006 election. The literature was mailed with a cover letter from the Littleton City Mayor advising board and commission members, "you might find [the literature] useful as you talk with friends and neighbors, and consider how you will vote." The City spent more than \$50 in supplies, postage and administrative staff time to produce the Mayor's cover letter and to copy and mail the literature. Complainant, who is one of the board members that received the mailing, was offended by what he viewed as the expenditure of public money in an attempt to influence his vote. He filed a complaint with the Secretary of State.

The Fair Campaign Practices Act (FCPA), § 1-45-117(1)(a)(I)(A), C.R.S., bars government entities from expending public money from any source to urge electors to vote in favor of or against any state-wide ballot issue. An exception to this rule applies to government employees or council members who have policy-making responsibilities. Such persons may spend not more than \$50 "incidental to expressing his or her opinion" on ballot issues.

Complainant alleges that the Mayor and the City Council violated the FCPA by spending more than \$50 to print and distribute literature that opposed Amendment 38. The defendants respond that the anti-Amendment 38 literature reflected the opinions not only of the Mayor, but also of at least four other Council members. Therefore, they argue, they were authorized to spend \$50 each and an aggregate of \$250 to express their opinions.

Two issues are presented. The first, raised by the parties, is whether the \$50 exception may be multiplied by the number of people agreeing with the opinion to arrive at a larger aggregate number. The second, raised by the ALJ *sua sponte*, is whether an exception exists for internal government communications, and if so whether it applies in this case. The ALJ concludes that, at least in the circumstances of this case, the \$50 exception cannot be multiplied to arrive at a larger aggregate figure, and that no internal government communication exception applies.

Findings of Fact

1. Amendment 38 is a state-wide ballot issue to be decided in the 2006 General Election. It seeks to expand the ability of citizens to propose changes to state laws and local ordinances by, among other things, extending the petition process to all levels of Colorado government that use a legislative process.

2. The Colorado Municipal League (CML) is a non-profit organization representing Colorado's cities and towns. In early August 2006, CML published a memorandum with attachments in opposition to Amendment 38. CML believes Amendment 38 is bad for Colorado municipalities because it will stifle the municipal legislative process. The CML memorandum contains six arguments why Amendment 38 "needs to be defeated," and urges its membership to "Help us spread the word about Amendment 38; it's bad for Colorado, and it's bad for Colorado municipalities." The memorandum is entirely one-sided and offers no argument in favor of Amendment 38.

3. The City of Littleton is a political subdivision of the State of Colorado.¹ It is governed by a City Council of seven members. Mayor James Taylor is the Council President and one of the seven voting members. Each of the seven voting members has policy-making responsibility.

4. The CML memorandum came to the attention of Amy Conklin, a Littleton City Council member. At the August 15, 2006 meeting of the City Council, Ms. Conklin briefly discussed Amendment 38 and the CML memorandum, and asked that a copy of the memorandum be sent to each of the 99 Littleton board and commission members. Littleton's "boards and commissions" are established by Article VIII of the City Charter and § 2-2-1 of the City Code, and include the Board of Adjustment, Building Board of Appeals, Business/Industry Affairs Advisory Committee, Fine Arts Committee, Library Board, Museum Board, Planning Commission, Historical Preservation Board, and Liquor Authority. Board and commission members must be residents of Littleton, and

¹ The City of Littleton is a home rule city established by charter pursuant to Article XX, § 6 of the Colorado Constitution. *Satter v. City of Littleton*, 185 Colo. 90, 522 P.2d 95 (1974).

are appointed by and serve at the pleasure of the Council. Littleton City Code § 2-2-3.²

5. No member of the Council overtly objected to Ms. Conklin's proposal and therefore the Council's staff assumed responsibility for preparing a forwarding letter for the Mayor's signature and copying and distributing the materials.

6. The parties stipulate that at the time the CML memorandum was distributed to the board and commission members, Amendment 38's title had already been designated and fixed pursuant to § 1-40-106(1), C.R.S.

7. On August 21, 2006, City Council staff prepared a cover letter for Mayor Taylor's signature to accompany the CML memorandum. Mayor Taylor's letter read, in pertinent part:

Dear Board and Commission Members

As a valued citizen who takes an active role in the future of the community, we thought you would find the attached memo of interest. It was prepared by the staff of the Colorado Municipal League, an organization whose mission is to serve the interests of cities throughout Colorado.

We thought you might find this information useful as you talk with friends and neighbors, and consider how you will vote on the many amendments on this fall's election ballot.

If you have any questions, feel free to contact me or any member of the Littleton City Council.

Sincerely,

[signed]

James A Taylor
Mayor

8. Mayor Taylor signed the letter and it was mailed along with the CML memorandum and attachments to all 99 board and commission members. It was also delivered internally to three Council staff members. The packet contained a total of six pages of material, including the Mayor's cover letter and the CML memorandum and attachments.

9. Complainant was one of the board members to whom the packet was mailed. Complainant is a member of the Littleton Building Board of Appeals, a position he has held for a number of years. He was offended by the mailing because he believed it was an attempt by the City Council to influence his vote on Amendment 38.

10. The expense to prepare the Mayor's letter and to copy and mail the letter and enclosed memorandum and attachments was \$157.85, calculated as follows:

² The ALJ takes judicial notice of the Littleton City Charter and Code.

<u>Item</u>	<u>Cost</u>
Director of Communications' time to dictate Mayor's letter	\$ 1.97
Executive Secretary's time to type dictated letter, arrange for copying, assemble mailing and affix postage	\$ 62.32
Copy center staff time to make copies	\$ 1.88
City Clerk's time to prepare mailing labels	\$ 4.15
Letterhead for Mayor's cover letter	\$ 7.92
Plain bond paper for memorandum and attachment	\$ 3.19
Postage for 99 mailed packets	\$ 62.37
99 envelopes	\$ 13.05
Address labels	\$ 1.00

Total Expense \$157.85

11. The \$157.85 expense was funded by the City of Littleton and was therefore "public money" within the meaning of § 1-45-117(1)(a)(I), C.R.S.

12. The amount of \$157.85 does not include any allowance for the prorata cost of equipment and facilities used to produce, copy and mail the materials.

13. Complainant estimates the cost of copying and mailing the anti-Amendment 38 material to be somewhat higher, at \$842.52. Complainant's estimate is based upon the fact that the City charges members of the public \$1.25 per sheet to make copies. Using that figure, the copy charge alone for 99 copies of six pages of material would be \$742.50.

14. The City charges the public \$1.25 per page because that is the amount allowed by the Open Records Act, § 24-72-205(1), C.R.S. The evidence is not sufficient to show that \$1.25 per page reflects the City's actual cost of copying. The ALJ therefore finds that the expense of \$157.85 is a more realistic calculation of the actual cost to produce, copy and mail the materials.

15. The August 15, 2006 City Council meeting at which the CML memorandum was discussed was attended by the Mayor and the six other Council members. The CML memorandum was not distributed to the City Council in advance of the meeting, but Ms. Conklin verbally summarized it prior to asking that it be distributed to all board and commission members. No formal vote was taken upon Ms. Conklin's request, but in the absence of overt objection by any of the Council members, Council staff assumed it was appropriate to distribute the materials as requested.

16. Mayor Taylor, Ms. Conklin and three other Council members testified at the hearing that they opposed Amendment 38 and were in favor of distributing the CML memorandum to board and commission members. However, no one other than Ms.

Conklin formally expressed an opinion at the meeting and, because there was no formal vote upon Ms. Conklin's request, the minutes of the meeting do not reflect the opinion of any Council member. The minutes state only that, "CM Conklin wants copies of the CML memo about the impacts of Amendment 38 given to council and all board & commission members."

17. Although five Council members, including Ms. Conklin and Mayor Taylor, approved of distributing the CML memorandum, it cannot be assumed that all Council members agreed even though they voiced no objection at the August 15th meeting. In fact, one of the Council members, Mr. Doug Clark, stated at a subsequent meeting of the Council that he was opposed to distributing the literature at City expense.

Discussion and Conclusions of Law

Colorado's Campaign Finance Laws

The FCPA, §§ 1-45-101 to 118, C.R.S., was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again revised by initiative in 2002 as the result of the adoption of Article XXVIII of the Colorado Constitution. The purpose of the FCPA is to avoid the potential for, and the appearance of, corruption in the political process. Section 1-45-102.

The section of the FCPA at issue in this case is § 1-45-117(1)(a)(I)(A). That section prevents government agencies and political subdivisions from expending "any public moneys from any source ... to urge electors to vote in favor of or against any ... state-wide ballot issue that has been submitted for the purpose of having a title designated and fixed ... or that has had a title designated and fixed." Its purpose is to promote confidence in government by prohibiting the use of money authorized for public purposes to advance the personal viewpoint of one group over another, *Denver Area Labor Federation v. Buckley*, 924 P.2d 524, 528 (Colo. 1996); and to prevent state or political subdivisions from devoting public resources toward persuading voters during an election. *Coffman v. Colorado Common Cause*, 102 P.3d 999, 1006 (Colo. 2004). Violations subject the agency or political subdivision to fines, injunctive relief, restraining orders and other "appropriate" relief. Section 1-45-117(4).

The elements of an FCPA violation

As applied to this case, the elements necessary to prove a violation of § 1-45-117(1)(a)(I)(A) are:

- 1) That the City of Littleton is a political subdivision of the state;
- 2) Which expended public moneys;
- 3) To urge electors to vote against Amendment 38;
- 4) Which had been submitted for the purpose of having a title designated and fixed or which had a title designated and fixed.

Nothing in § 1-45-117(1) prohibits City Council members from expressing

personal opinions against Amendment 38; nor is the Council as a body prohibited from expressing its collective opinion by adopting and reporting a resolution in opposition to Amendment 38. Sections 1-45-117(1)(b)(II) and (III)(A) and (B). Furthermore, *personal* funds in any amount may be expended to express these opinions. Section 1-45-117(1)(b)(III)(C). It is the spending of *public* money that is prohibited.

As the complainant, Mr. Brown bears the burden of proving the elements of his claim by a preponderance of the evidence. Section 24-4-105(7), C.R.S., as applied by Colo. Const. art. XXVIII, § 9(1)(f). There is little doubt that all four elements have been proven: (a) The City is a political subdivision of the State of Colorado; (b) the City Council authorized its staff to expend public funds to copy and distribute literature; (c) that literature was entirely one-sided against Amendment 38 and urged its defeat; and (d) at the time the literature was sent out, the title of Amendment 38 had already been designated and fixed.

Although Mayor Taylor's cover letter did not specifically ask the board and commission members to vote against Amendment 38, nor did he express a personal opinion on the matter, his letter commended the attached CML memorandum for the recipients' consideration and provided no alternative view of Amendment 38. As such, the packet taken in its entirety "urged" recipients to vote against Amendment 38 and thus violated § 1-45-117(1)(a)(I). See *Skruch v. Highlands Ranch Metropolitan Districts No. 3 and 4*, 107 P.3d 1140, 1142 (Colo. App. 2004)(a brochure which fails to present balanced arguments but takes a position exclusively in favor of one position may be said to "urge" voters to adopt that position).

Exception - \$50 incidental to personal opinion

Even though the elements of § 1-45-117(1)(a)(I)(A) have been proven, there remains the question of whether an exception exists. One such exception, argued by the parties, is found in § 1-45-117(1)(a)(II), C.R.S. That provision permits members or employees of a government entity who have policy-making responsibilities to expend no more than \$50 of public money "in the form of letters, telephone calls, or other activities *incidental to expressing his or her opinion* on any [ballot issue]." *Italics added.*

The City argues that because Council Member Conklin and four other Council members opposed Amendment 38, and each had policy-making responsibility, each was entitled to spend \$50 of public money to express his or her opinion on the issue. The City further argues that because each council member was in favor of Ms. Conklin's proposal to distribute the CML memorandum, his or her \$50 allowance should be aggregated to permit a total expenditure of \$250, a sum sufficient to cover the \$157.85 actually spent. As the proponent of this exception, the City bears the burden of proof. *Cooper & Lybrand v. Fox*, 758 P.2d 683, 686 (Colo. App. 1988).

The ALJ is not convinced by the City's argument, from either a factual and practical viewpoint. Factually, the evidence does not support the argument that each of the four other Council members "expressed" his or her opinion by acceding to Ms. Conklin's request to distribute the CML memorandum. In construing the reach of this statutory exception, the ALJ is to give effect to the intent of the General Assembly by

first giving words and phrases their commonly accepted and generally understood meaning. *Town of Superior v. Midcities Co.*, 933 P.2d 596, 600 (Colo. 1997). Although the term “expressing” is not defined in the FCPA, the word “express,” in the context of stating an opinion, is commonly understood to mean, “to put into words; represent by language; ... to make known; reveal; show.” *Webster’s New Twentieth Century Dictionary, Unabridged* 647 (2nd ed. 1983). This definition requires some action by the opinion holder to make his or her opinion known to others. However, as far as the City Council minutes show, it was only Council Member Conklin that made her opinion known; and it was only Mayor Taylor who signed the transmittal letter. The opinions of the other Council members are not revealed in either the minutes or the Mayor’s cover letter. Thus, even though other Council members may have held opinions opposing Amendment 38, they did not reveal or express those opinions in connection with the distribution of the CML memorandum. Therefore, from a purely factual standpoint, the evidence is not sufficient to support the City’s argument that the money was spent incidental to “expressing” the opinions of five Council members.

Furthermore, the City’s argument is unsupportable from a practical standpoint because, if accepted, it would gut the rule. As stated before, the purpose of the rule is to promote confidence in government by prohibiting the use of public money to sway votes. *Denver Area Labor Federation, supra; Coffman, supra*. If a government body could multiply the \$50 allowance by the number of members in its voting body, potentially large expenditures could result. Not only would this vitiate the intent of the rule, but it would also give bodies with large numbers of voting members an advantage over bodies with few voting members. The legislature surely could not have intended such an inequitable result. Statutes are not to be construed in a manner that defeats legislative intent or that leads to absurd results. *Hall v. Walter*, 969 P.2d 224, 229 (Colo. 1998); see also *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 593 (Colo. 2005)(a statutory interpretation leading to an illogical or absurd result will not be followed).

Exception – internal government communication

Though not specifically argued by the parties, the evidence also raises the question of whether there is an exception for internal government communications.³ Though not explicitly stated in § 1-45-117(1), an exception for internal government communications is implicit from the language that prohibits spending public money “to urge voters” to vote a certain way. Internal government communications that are not intended “to urge” a certain vote do not violate the FCPA, even though the recipient government employees are also voters. Indeed, it would be difficult for the government to function if its employees and officers could not communicate freely. The essential feature of this exception, therefore, is whether the communication was intended for official purposes, or whether it was intended to “urge” or influence the recipient’s vote.

Applying that analysis to this case, the ALJ concludes that Mayor Taylor’s letter

³ The only reported case mentioning this exception is *Coffman*, 102 P.3d at 1003, where the issue was raised by the parties and rejected by the ALJ, but not specifically decided by the court.

forwarding the CML memorandum was intended to influence the vote of the individual recipients, and not merely inform them of an issue affecting their duties as board and commission members. The Mayor's letter pointedly addresses each board and commission member as a "valued citizen who takes an active role in the future of the community," rather than as government officers; it encourages the members to use the information, "as you talk with friends and neighbors," rather than merely as information to help them perform their jobs; and, perhaps most significantly, it commends the CML memorandum as "useful as you ... consider how you will vote." This language patently addresses the board and commission members in their personal capacity as voters, and not in their official capacities as government officers. The ALJ therefore concludes the communication was not exempt from the FCPA.

Summary

The anti-Amendment 38 literature forwarded to the Littleton board and commission members by Mayor Taylor urged those members to vote against Amendment 38 and to take an active role among their friends and neighbors in opposing Amendment 38. As such, it violated § 1-45-117(1)(a)(I)(A) of the FCPA because more than \$50 in public money was spent to copy and distribute the materials.

Sanction

Section 1-45-117(4) permits the ALJ to order "any appropriate order or relief, including injunctive relief or a restraining order to enjoin the continuance of the violation." Fines are authorized as an appropriate sanction for violations of § 1-45-117. *Colorado Common Cause v. Coffman*, 85 P.3d 551, 556 (Colo. App. 2004), *aff'd on other grounds*, *Coffman v. Colorado Common Cause*, 102 P.3d 999 (Colo. 2004).

Although the amount of public money actually expended in this case was relatively insignificant, the violation of the FCPA was not. The City Council's mailing of the anti-Amendment 38 literature attempted to influence the vote of the board and commission members, and encouraged those members to influence the votes of their friends and neighbors. The fact that the board and commission members were appointed by and served at the pleasure of the Council makes the attempt to influence their vote all the more untenable. Although the City Council has a right to express its opinion opposing Amendment 38, either by resolution or by the personal opinions of its members, it does not have the right to spend City money, in excess of \$50, to promote that opinion.

For this violation the ALJ imposes a fine of \$500.

Agency Decision

The City of Littleton violated § 1-45-117 of the Fair Campaign Practices Act by expending public money in excess of \$50 to copy and mail anti-Amendment 38 literature to its board and commission members. The City of Littleton shall pay a fine of \$500 for this infraction. This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

Done and Signed

October 6, 2006

ROBERT N. SPENCER
Administrative Law Judge

Digitally recorded in CR #1

Exhibits admitted

For complainant: exhibits 1, 2, 3

For defendants: exhibits, A through G

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Norman L. Brown
6081 S. Spotswood Street
Littleton, CO 80120

Larry W. Berkowitz, City Attorney
Brad D. Bailey, Assistant City Attorney
2255 W. Berry Avenue
Littleton, CO 80165

and

William Hobbs
Secretary of State's Office
1700 Broadway, Suite 270
Denver, CO 80290

on this ____ day of October 2006.

Technician IV